

March 14, 2018

Ex Parte Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 2055

Re: Second Report and Order Published in FCC-CIRC 1803-0

Dear Ms. Dortch:

I am providing these comments on behalf of the Jamul Indian Village of California, a federally recognized American Indian Tribe, its government, its community and its heritage in the Southern California area. The importance of meaningful government-to-government consultation regarding projects or actions with potential impacts to Tribal cultural resources cannot be overstated. It for this reason that we raise the concerns provided below regarding the current FCC process and proposal known as its Second Report and Order published in FCC-CIRC 1803-01 ("2RO"). Please know that we are not against progress and technology, and we support the improvements envisioned by the communications industry, particularly in under-served Native American lands. However, these improvements should not be hastened at the cost of the potential loss of our heritage, or at the cost of removing the processes created to protect these resources.

Why Tribal Consultation and involvement is imperative for every ground-disturbing action approved by the FCC

The proposed rule-making seeks to "streamline" the process for approval of new or remodeled tower projects by creating a regulatory fiction that smaller sites are either invisible or ethereal, and to treat them like they are not actually occurring for the purposes of NEPA and NHPA. This idea on its face is absurd. An action is being taken on projects and, regardless of size, there are potential impacts to irreplaceable resources that should be considered and cannot be ignored. Likewise, the proposal suggests that "previously disturbed" sites be exempted from Tribal review and consultation. This should only occur where the previously disturbed site was previously reviewed for cultural resource impacts, and that report is reviewed and its veracity confirmed prior to the exemption.



EMAIL: info@jamulindianvillage.com

TEL: 619.669.4785

FAX: 619.669.4817

ADDR: P. O. Box 612
Jamul, CA 91935

jamulindianvillage.com

In considering the gravity of Tribal consultation for individual projects, it is important to recognize the nature of cultural resources. As historical cultural resources, they are not renewable resources, and they are not diminished in value by their location or number. Replacement historical cultural resources cannot be grown in another location, and historical resources should not be blindly sacrificed for the sake of expediency. There is no way to know whose resources are lost. Moreover, in addition to the extreme value of historic cultural resources, they are rare and ubiquitous at the same time. These resources are the remaining history of people that lived through the dimensions of time and space throughout San Diego County, California, and the continent for thousands of years. While the resources have been ravaged and lost in many, many instances, they could be anywhere and remnants could be of any size. As a result, it is illogical and antithetical to the premise of the NHPA and NEPA to fashion an exemption from Tribal involvement based on the small size of a tower site or action. There is simply no way that an agency can make a determination that critical resources will not be lost through such an irresponsible proposal and contravention of the NHPA.

If the FCC was to be forthright about this process and acknowledge that such impacts would occur, it would incumbent upon the FCC to quantify its best estimates of the cultures that would be impacted by the wholesale dismissal of impacts from certain projects based solely on size, and engage in meaningful consultation with affected Tribes regarding how these impacts may be avoided, and whether residual impacts are acceptable. No such analysis or recognition has occurred. This proposal cannot reasonably be brought to a decision without this acknowledgement and consultation process.

There has been no meaningful consultation on the Proposed R02.

Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments" (2000), directs federal agencies to respect tribal self-government and sovereignty, tribal rights, and tribal responsibilities whenever they formulate policies "significantly or uniquely affecting Indian tribal governments." The executive order applies to all federal agencies, encouraging "**meaningful and timely**" *consultation* with tribes, and consideration of compliance costs imposed on tribal governments when developing policies or regulations that may affect Indian Tribes. The FCC has created similar direction specific to its own operations, in stating that the Commission "will consult with Tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments, their land and resources." (Policy Statement, FCC 00-207).

The federal government defines consultation as "a process that aims to create effective collaboration with Indian tribes and to inform Federal decision-makers. Consultation is built upon government-to-government exchange of information and promotes the enhanced communication that emphasizes trust, respect, and shared responsibility." (Secretary of Interior Order No. 3317).

To date, no meaningful consultation or true exchange of information has occurred with our Tribe or others regarding this proposed action, which could lead to calamitous results to our community and history. However, the FCC 2RO provides a fiction that consultation has occurred. The Report states that our Tribe (along with others) was consulted with on three occasions regarding the proposed action (*see* FCC CIRC 1803-01, paragraphs 23, 28 and 29). However, in each such occasion, our Tribe was only provided information unidirectionally from the FCC, and there was no availability for dialogue to share views, discuss concerns and present improved solutions. In fact, the commission staff that ran these meetings instructed that they were not considered consultation. This was not effective collaboration or any form of two-sided information exchange.

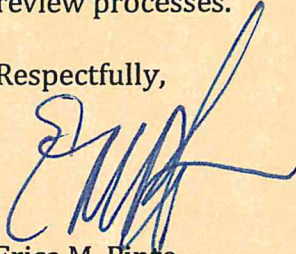
The proposed action cannot “inform decision-makers” without a meaningful actual consultation, wherein the Commission is provided and discusses concerns from Tribal governments consistent with the requirements of federal law and the trust responsibility to Indian Tribes. Such a meaningful consultation will allow Tribes to engage in developing a reasonable and protective strategy for the FCC’s proposed future activities, without sacrificing our heritage and resources. We implore the FCC to step back from the current proposal to put on blinders to projects based on size, and instead develop a strategy based on the potential impact to cultural resources. We believe that working in true consultation with Tribes, including ours, we can fashion a less reckless and more effective result for you and the industry’s concerns.

Finally, it is worth noting that the proposed action seeks to redefine the scope of two federal laws—National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA)--which provides the primary protection to avoid the piecemeal loss of Tribal cultural resources throughout the country. The NHPA does not define “Federal undertakings” based on size of a project. The Advisory Council on Historic Preservation has defined a Federal undertaking in 36 CFR 800.16(y) as a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; those requiring a Federal permit, license or approval; and those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency. For the FCC to seek to circumvent this definition by creating its own exemption based on the size of a project is creative, but not enforceable. Such a redefinition exceeds the scope of the FCC and is likely challengeable as an unlawful attempt to circumvent the legislative process, and diminish the integrity of NEPA and NHPA. The RO2 should be withdrawn at once.

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The Jamul Indian Village appreciates the opportunity to comment on these matters and welcomes the ability to become meaningfully involved in assisting the FCC resolve its review processes.

Respectfully,

A handwritten signature in blue ink, appearing to read 'Erica M. Pinto', with a stylized, flowing script.

Erica M. Pinto
Chairwoman
Jamul Indian Village of California

cc: Senator Tom Udall
Senator John Hoeven